IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 159 Misc.

EX PARTE GENE MITCHELL GRAY, LINCOLN ANDERSON BLAKENEY, JOSEPH HUTCH PATTERSON AND JACK ALEXANDER,

Petitioners.

ON PETITION FOR WRIT OF MANDAMUS

BRIEF FOR PETITIONERS

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Opinions Below

After notice and hearing, the statutory three-judge District Court for the Eastern District of Tennessee convened pursuant to Title 28, United States Code, Section 2281 disclaimed jurisdiction and remanded the cause for proceedings before the District Judge in the District petitioners had filed their complaint. An opinion setting forth the reasons for their action was filed on April 13, 1951. It appears at pages 35-40 of the record and is not officially reported.[1] District Judge TAYLOR, without further hearing or notice to the parties, on April 20, 1951, filed an opinion in which he found that petitioners had been denied the equal protection of the laws, but refused to grant injunctive relief. The cause was retained "for such orders

[1] All record citations are to the record filed in the appeal phase of these proceedings, now pending before this Court as Case #120.

as may be proper when it appears that the appropriate law has been finally declared." His opinion is reported in 97 F. Supp. 463 and may be found at pages 40-47 of the record.

Jurisdiction

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1651(a) since the ordinary remedy of appeal and certiorari may be unavailable and inadequate, and petitioners' right to take an appeal in this case, pursuant to Title 28, United States Code, Section 1253 is beclouded with doubt.

Petitioners made application in the court below for a preliminary and permanent injunction to restrain the enforcement of certain constitutional and statutory provisions of the State of Tennessee, and a December 4, 1950 order of the Board of Trustees of the University of Tennessee, on the grounds that these aforesaid provisions and order deny to petitioners the equal protection of the laws as secured by the Fourteenth Amendment to the Constitution of the United States (R. 1-20). In its answer, the state defended its refusal to admit petitioners to the University of Tennessee on the grounds that it had no other recourse under Article 11, Section 12 of the Constitution and under Sections 11395, 11396 and 11397 of the Code of Tennessee (R. 25-27). Thus, the issue of the constitutionality of the order of an administrative agency and of the laws of the State of Tennessee were squarely in issue in these proceedings, and since injunctive relief is sought, determination by a three judge court is made mandatory under federal statutes.

Statement of the Case

Petitioners, having met all lawful requirements, made due and timely application for admission to the graduate school and the law school of the University of Tennessee. Gene Mitchell Gray sought permission to enroll in the graduate school commencing in the fall quarter of 1950, and Jack Alexander desired approval of his application for enrollment in the graduate school beginning in the winter quarter of 1951. Both Lincoln Anderson Blakeney and Joseph Hutch Patterson desired to enroll in the first-year class of the law school in the winter quarter of 1951 (R. 9).

The University of Tennessee is the only state institution offering the courses petitioners desire to pursue, and they would have been admitted except for the fact that they are Negroes (R. 6). On December 4, 1950, the Board of Trustees of the University of Tennessee met and denied petitioners' application solely because of their color (R. 14). Its action was embodied in the following formal order:

> "Whereas, the Constitution and the Statutes of the State of Tennessee expressly provide that there shall be segregation in the education of the races in schools and colleges in the State and that a violation of the laws of the State in this regard subjects the violator to prosecution, conviction, and punishment as therein provided; and,
>
> "Whereas, this Board is bound by the Constitutional provision and acts referred to;
>
> "Be it therefore resolved, that the applications by members of the Negro race for admission as students into The University of Tennessee be and the same are hereby denied" (R. 14).

The applicable constitutional and statutory provisions on which this order was based are:

Article 11, Section 12 of Constitution of Tennessee:

". . . And the fund called the common school fund, and all the lands and proceeds thereof . . . heretofore by law appropriated by the General Assembly of this State for the use of common schools, and all such as shall hereafter be appropriated, shall remain a perpetual fund, . . . and the interest thereof shall be inviolably appropriated to the support and encouragement of common schools throughout the State, and for the equal benefit of all the people thereof. . . . No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school. . . ."

Section 11395 of the Code of Tennessee:

". . . It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning."

Section 11396 of the Code:

". . . It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent or procurement."

and

Section 11397 of the Code:

". . . Any person violating any of the provisions of this article, shall be guilty of misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars, and imprisonment not less than thirty days nor more than six months."

Petitioners thereupon filed a complaint on January 12, 1951, in the court below, in the nature of a class suit in which application was made for both a preliminary and permanent injunction seeking to restrain the enforcement of the December 4 order of the Board of Trustees, and Article 11, Section 12 of the Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee on the grounds that the aforesaid provisions and order under attack deprived petitioners of rights secured under the Fourteenth Amendment to the Constitution of the United States (R. 1-20).

On February 1, 1951, the state filed its answer, in which no material allegations in petitioners' complaint was controverted and in which the denial of petitioners' admission to the University of Tennessee was defended on the grounds that such denial was required by its constitution and statutes (R. 25-27).

On February 12, 1951, petitioners filed a motion for judgment on the pleadings (R. 28). The court below, which had been convened pursuant to Title 28, United States Code, Sections 2281 and 2284 (R. 28-29) held a hearing in Knoxville, Tennessee, on March 13, 1951, and on April 13, 1951, handed down an opinion in which jurisdiction was disclaimed; the three-judge court was ordered dissolved; and the cause remanded to District Judge Robert Taylor, in whose District the complaint had been filed, for further proceedings (R. 35-40).

On April 20, 1951, Judge Taylor held that the state's refusal to admit petitioners to the University of Tennessee constituted a denial of the equal protection of the laws but refused to issue any affirmative order in enforcement of petitioners' rights (R. 40-47). The cause was brought here on direct appeal. Since the right to direct appeal is in doubt and may be inappropriate, petitioners filed a motion for leave to file a petition for writ of mandamus to secure

the issuance of a mandatory writ from this Court directing the three judge court to reconvene and to make a final determination in this cause. The motion was granted on October 15, 1951, and a rule to show cause issued. Response to the rule was made and on December 3, 1951, this Court ordered argument on this phase of the case.

Error Relied On

The court below erred in refusing to exercise its jurisdiction which had been properly invoked pursuant to the requirements of Title 28, United States Code, Sections 2281 and 2284.

Summary of Argument

Petitioners are here seeking the issuance of a writ of mandamus to require the specially constituted United States District Court for the Eastern District of Tennessee, consisting of the Hon. Shackelford Miller, Jr., Judge, United States Court of Appeals for the Sixth Circuit, Leslie R. Darr, and Robert L. Taylor, Judges, United States District Court for the Eastern District of Tennessee to reconvene in order to finally determine petitioners' right to a temporary and a permanent injunction as applied for in their complaint.

Petitioners sought injunctive relief in the court below against enforcement of a statewide policy, as evidenced in the December 4th order of the Board of Trustees of the University of Tennessee, Article 11, Section 12 of Constitution and Sections 11395, 11396 and 11397 of the Code of Tennessee, all of which prohibit the admission of Negroes to the graduate and professional schools of the University of Tennessee. Because of the nature of the case a hearing and determination by a three judge court was mandatory.

If a single judge had refused to convene a three judge court, it is settled that petitioners' proper recourse was to apply for writ of mandamus in this Court.

Here, however, a three judge court was properly convened, and after notice and hearing held on March 13, 1951, the court declared itself to be without jurisdiction and issued an order dissolving the statutory court and remanded the cause for further proceedings before District Judge Robert Taylor. Such proceedings subsequently took place in accordance with this order. The order remanding the cause to Judge Taylor, sitting alone, could not confer jurisdiction which he did not possess. Only a three-judge district court has jurisdiction to hear and determine petitioners' cause.

This petition has been filed as an alternative remedy in the event the appeal now pending is held to be procedurally improper. Where review by appeal is unavailable, mandamus will lie to require a lower federal court to exercise jurisdiction in a proper case. In this case, if the order dissolving the three-judge court cannot be reviewed on appeal, a writ of mandamus should issue directing the three judges who signed the order to reconvene and render a final decision in this case.

ARGUMENT

I

This cause is one in which a three-judge court has jurisdiction.

A preliminary and a permanent injunction to restrain the enforcement of the December 4th, order of the Board of Trustees, refusing to admit petitioners to the University of Tennessee pursuant to Article II, section 12 of the Constitution of the State and Sections 11395, 11396 and 11397 of the Code of Tennessee are here being sought on the grounds that the order, constitutional provision and statutes deprive petitioners of their right to equal educational opportunities as secured under the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The University officials are state officers, *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337; and the Board of Trustees of the University of Tennessee is an administrative board within the meaning of Title 28, United States Code, Sections 2281 and 2284. *McLaurin* v. *Board of Regents*, 339 U. S. 637; *Board of Supervisors, La. State University* v. *Wilson*, 340 U. S. 909. Petitioners' claim that the state has deprived them of the equal protection of the laws presents a substantial federal question. *Sweatt* v. *Painter*, 339 U. S. 629; *Sipuel* v. *Board of Regents*, 332 U. S. 631.

The court below stated that state legislation requiring segregation was not unconstitutional because of the feature of segregation. In support of this proposition, *Plessy* v. *Ferguson*, 163 U. S. 537; *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151; *Berea College* v. *Kentucky*, 211 U. S. 45; and *Gong Lum* v. *Rice*, 275 U. S. 78 were cited. It is alleged that *Sweatt* v. *Painter*, *supra*, did not change this rule. It sought to redefine the issues raised by describing them as allegation of unjust discrimination under the equal protection

clause rather than of the constitutionality of state segregation statutes (R. 39-40). What we take the court to mean is that in the light of these decisions, petitioners' claim that the denial of their admission to the University of Tennessee, pursuant to the state's policy requiring the segregation of the races in all phases of its educational system including professional and graduate education, is unconstitutional has been foreclosed, and that hence that claim does not present a substantial federal question. Even assuming *arguendo* the correctness of the court's view, we fail to see how it affects petitioners' right to have their applications for injunctive relief heard and determined by a three judge court. At the very least those cases stand for the proposition that enforced racial segregation is permissible under the Constitution as long as the facilities provided Negroes are equal to those available to white persons. This is the condition which must be satisfied if segregation laws are to be held constitutional under the *separate but equal* doctrine. *Ergo,* where that condition has not been met such statutes are necessarily invalid. Certainly where the record shows that: (1) the University of Tennessee is the only state institution offering the courses petitioners desire to pursue; (2) that they have been denied admission thereto solely because of their race, pursuant to state policy; and (3) that petitioners seek to enjoin enforcement of that policy on the grounds that it conflicts with the federal constitution, a substantial claim of unconstitutionality has been made. See *Missouri ex rel. Gaines* v. *Canada, supra.*

We contend that all the ingredients essential to the jurisdiction of a three judge federal court have been met. See *Stratton* v. *St. Louis S. W. Ry. Co.*, 282 U. S. 10; *Smith* v. *Wilson*, 273 U. S. 388; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *International Garment Workers Union* v. *Donnelly Garment Co.*, 304 U. S. 243; *Ex parte Hobbs*, 280 U. S. 168; *Phillips* v. *United States*, 312 U. S. 246; *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, 292

U. S. 386; *Ex parte Poresky*, 290 U. S. 30; *In re Buder*, 271 U. S. 461; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290. While equity jurisdiction may be withheld in the public interest in exercise of sound discretion, see *Spector Motor Service* v. *McLaughlin*, 323 U. S. 101; *Chicago* v. *Fieldcrest Dairies, Inc.*, 316 U. S. 168; *Burford* v. *Sun Oil Co.*, 319 U. S. 315, the public interest in this case demands that the chancellor exercise his power. See *McLaurin* v. *Board of Regents, supra*. Jurisdiction of a three judge district court was properly invoked, and the court below was in error in refusing to decide this case.

II

If review is not available on direct appeal mandamus will lie to require the court below to assume jurisdiction.

It is clear that where a single judge refuses to convene a three judge court, this Court may issue writ of mandamus directing him to do so. *Stratton* v. *St. Louis S. W. Ry. Co.*, *supra* at page 16; *Ex parte Collins*, 277 U. S. 565, 566; *Ex parte Bransford*, 310 U. S. 354, 355; *Ex parte Metropolitan Water Co.*, 220 U. S. 539; *Ex parte Williams*, 277 U. S. 267; *Ex parte Northern Pacific Ry. Co.*, 280 U. S. 142. Under such circumstance mandamus is the only appropriate procedural remedy, since direct appeal to this Court lies only from a decision by a properly convened three judge court. *Oklahoma Gas & Electric Co.* v. *Oklahoma Packing Co.*, *supra*; *Jameson & Co.* v. *Morgenthau*, 307 U. S. 171; *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 621; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16. Of course, the proceedings of District Judge TAYLOR subsequent to the order dissolving the three judge court are without effect, and he could be required to again convene a three judge

court. That would be an indirect method of indicating to the court below that it must assume jurisdiction of this cause. The vice, which petitioners seek to correct, however, concerns the refusal of the three judge court which had been properly convened to exercise jurisdiction which, we submit, it clearly possessed. We take the position that the order dissolving the court is appealable in that it was an effective denial of petitioners' application for injunctive relief. A judgment of dismissal or an express denial of injunctive relief, however, may be considered essential for this Court to have jurisdiction on appeal. In that event, we submit, mandamus will lie.

The only decision by this Court, which counsel for petitioners have found, on all fours with this case is *Ex parte Public Nat'l Bank*, 278 U. S. 101. In that case petitioners sought to invoke the jurisdiction of a three-judge court. That court disclaimed jurisdiction, dissolved the court and ordered the cause to proceed before a single district judge on the ground that the requirements essential to a three-judge court had not been met. Motion for leave to file a petition for writ of mandamus to compel the reassembling of the court of three judges was granted by this Court, and a rule to show cause issued. After hearing and argument the rule was discharged, this Court finding that petitioners' cause did not require determination by a three-judge court. Accord, *Osage Tribe of Indians* v. *Ickes*, 45 F. Supp. 179, 186, 187 (D. D. C. 1942). In that case, however, no attempt was made to invoke the jurisdiction of this Court on appeal and that phase of the problem was not considered.[2]

Mandamus will lie where this Court finds that appeal may be unavailable or inadequate. *Virginia* v. *Rives*, 100

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2 For a discussion of the procedural problems incident to this case, See Bowen, *When are Three Federal Judges Required* (1931), 16 Minn. L. Rev. 1, 39-42. The author favors mandamus rather than direct appeal as proper procedural remedy in a situation of this nature.

U. S. 313; *Kentucky* v. *Powers*, 201 U. S. 1; *Virginia* v. *Paul*, 148 U. S. 107; *Ex parte Skinner & Eddy Corp.*, 265 U. S. 86; *Ex parte Simmons*, 247 U. S. 231, 239; *Ex parte Fahey*, 332 U. S. 258, 260. It is used in appropriate cases in aid of this Court's supervisory power over lower federal courts. *McCullough Tool Co.* v. *Cosgrave*, 309 U. S. 634; *Ex parte United States*, 287 U. S. 241. Improper assumption or refusal or jurisdiction on a lower federal court may be reached by this writ. *Ex parte United States*, *supra*, 287 U. S. 241; *Ex parte Skinner & Eddy Corp.*, *supra*; *Ex parte Bradstreet*, 32 U. S. 64, 8 L. ed. 577; *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 32; *Ex parte United States*, 319 U. S. 730. Thus, in this case, if this Court finds it does not have jurisdiction on appeal, a writ of mandamus may appropriately be issued to compel the three-judge court below to reassemble and determine whether petitioner is entitled to the injunctive relief prayed for in her complaint.

Conclusion

For these reasons, it is respectfully submitted that a writ of mandamus should issue to compel the court below to reassemble as a specially constituted three-judge federal court and finally decide whether petitioners are entitled to injunctive relief in the event this Court holds that petitioners cannot have the order of the court below reviewed on direct appeal.

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